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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

JOSEPH JACOB BARSHOP, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. .....

JOSEPH JACOB BARSHOP, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner Joseph Jacob Barshop prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment of that Court entered in the certain cause pending in said Court, styled *Joseph Jacob Barshop, Appellant, vs. United States of America, Appellee,* Number 13,142, on the Docket of said Court; wherein Petitioner's Motion for Rehearing, timely filed, was entertained by the said United States Court of Appeals and overruled, and final judgment entered on November 23, 1951.

OPINIONS BELOW

The opinion of the United States Court of Appeals (R. 1220-1236) on original submission is reported, *Joseph Jacob Barshop vs. United States of America*, 191 Fed. (2d) 286; and is printed in the appendix (*post*, 49-65). The majority and dissenting opinions (R. 1275-1285) on motion for rehearing, presently not reported officially, are printed in the appendix to this petition (*post*, 67-77).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

The opinion of the United States Court of Appeals on original submission was handed down on August 22, 1951 (R. 1220). Petitioner's motion for rehearing, timely filed in accordance with the applicable rules of said Court of Appeals, was entertained by the Court and overruled on November 23, 1951 (R. 1275).

QUESTIONS PRESENTED

1. Whether Respondent's offering and the trial Court's admitting in evidence statements made by Petitioner to Revenue Agents under compulsion of Federal criminal statutes and the introduction of testimony of the Agent concerning failure of Petitioner to disclose facts amounted to compelling Petitioner to be a witness against himself in violation of the Fifth Amendment to the Constitution of the United States and a denial to Petitioner of the protection against self-incrimination pledged to him by the amendment.

2. Whether Respondent's offering and the trial Court's admitting in evidence testimony concerning the contents of records which Petitioner, under compulsion of Federal criminal statutes, kept and submitted to Revenue Agents for examination amounted to compelling Petitioner to be a witness against himself in violation of the Fifth Amendment to the Constitution of the United States and a denial to Petitioner of the protection against self-incrimination pledged to him by the amendment.

3. Whether Revenue Agents' obtaining information from Petitioner under authority of Federal criminal statutes which required Petitioner to give them information, and their obtaining knowledge of the contents of Petitioner's records under compulsion of Federal criminal statutes, and the use in evidence of such information and knowledge, amounted to an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States.

4. Whether Petitioner was deprived of the right against self-incrimination secured to him by the Fifth Amendment to the Constitution of the United States by reason of the trial Court's conditioning, upon Petitioner's first testifying as a witness, Petitioner's right to prove by his witness Dreeben that some years prior to any investigation of Petitioner's income tax returns, Petitioner had stated to the witness that income received by Petitioner from his pineapple business was not subject to Federal income tax.

5. Whether the trial Court, after Respondent had

proved that soon after the indictment was returned Petitioner made a remittance of $260,106.15 to the local Collector of Internal Revenue, erred in refusing to permit Petitioner to introduce in evidence the letter which accompanied the remittance.

6. Whether the trial Court erred in refusing to give in charge to the jury Petitioner's timely made and properly presented request for an instruction on the law of circumstantial evidence.

7. Whether the trial Court erred in permitting Respondent to prove Petitioner's brother-in-law did not report for income tax purposes sums of money withdrawn by him from Petitioner's business.

STATUTES INVOLVED

The following statutes are involved and they are printed in the appendix at the pages indicated:

Title 26, Section 51(a), U.S.C., 1946, as amended, 62 Stat. 114, 115 (Appendix 79).

Title 26, Section 54(a), U.S.C., 1946 (Appendix 79).

Title 26, Section 54(b), U.S.C., 1946 (Appendix 79).

Title 26, Section 57, U.S.C., 1946 (Appendix 80).

Title 26, Section 3614(a), U.S.C., 1946 (Appendix 80).

Title 26, Section 3615(a), U.S.C., 1946 (Appendix 80-81).

Title 26, Section 3615(b)(4), U.S.C., 1946 (Appendix 81).

Title 26, Section 3616(b), U.S.C., 1946 (Appendix 81).

Title 26, Section 3632, U.S.C., 1946 (Appendix 81-82).

Title 26, Section 3633(a), U.S.C., 1946 (Appendix 82).

Title 26, Section 145(a), U.S.C., 1946 (Appendix 83).

Title 26, Section 145(b), U.S.C., 1946 (Appendix 83).

STATEMENT

Petitioner is charged with violating Section 145(b) of Title 26, United States Code, 1946. The indictment, in five counts, charges that by filing and causing to be filed false and fraudulent income tax returns for the years 1942, 1943 and 1944, Petitioner "wilfully and knowingly" attempted to defeat and evade payment of a part of the taxes due by him for those years; and that in like manner he "wilfully and knowingly" attempted to defeat and evade payment of a part of the taxes due by his wife for the years 1943 and 1944.

Petitioner was convicted upon trial before a jury and given a prison sentence. On appeal to the Court of Appeals for the Fifth Circuit the judgment of the trial Court was affirmed and motion for rehearing, timely filed, was overruled by a majority of the Court, with Circuit Judge Rives dissenting on points involved in the first, second and fifth of the above presented questions.

The questions presented in this petition for certiorari arose in the following manner: An agent of the Bureau of Internal Revenue, acting under authority of those statutes which empower the Com-

missioner of Internal Revenue and his agents to examine the books, papers, records and memoranda of taxpayers and take statements from them for the purpose of ascertaining the correctness of income tax returns and determining the civil liability of taxpayers to the Government, called upon Petitioner to submit his books and records for examination and interviewed Petitioner concerning his business affairs. (R. 224-230.) Upon the trial of this case the agent was offered as a witness against Petitioner and he was permitted to testify over Petitioner's objection (R. 231) to the contents of Petitioner's books and records; to statements made to him by Petitioner; and as to Petitioner's failure to make certain disclosures. In this manner statutes which are designed to give the Commissioner a means of enforcing payment of taxes by civil proceedings were made a means of compelling disclosure of facts for use in the prosecution of a criminal case. Petitioner had little choice but to supply the requested information, for failure to do so would have made him liable to prosecution under Section 145(a), Title 26, U.S.C., making wilful failure to furnish information under such circumstances a criminal offense.

The witness Dreeben was not permitted to testify in behalf of Petitioner until after Petitioner had testified (R. 699, 1206-1208). Dreeben's testimony was to the effect that prior to the commencement of the investigation of Petitioner's income tax returns involved in this case, and possibly prior to the filing of one or more of them (R. 699), Petitioner had told the witness of Petitioner's pineapple business and that his income from that business was not subject

to income taxes. Respondent contended that by failure to report his income from this part of his business, Petitioner had knowingly and wilfully attempted to defeat and evade payment of a part of his income taxes. Petitioner defended against this contention on the ground that it was his good faith belief that income from that source was commissions earned in a business conducted in Mexico and that he was not required to report or pay taxes on such income. The ruling of the trial Court had the effect to make Petitioner's right to offer Dreeben's testimony depend upon Petitioner's taking the stand to testify in his own behalf.

At the opening of the trial the Government proved that soon after the indictment was returned Petitioner made a remittance of $260,106.15 to the local Collector of Internal Revenue (R. 2, 63-65). The remittance was accompanied by a letter from Petitioner which explained his purpose in making the remittance (R. 71-72) and was calculated to remove any adverse inference that might be drawn from the bare making of remittance in so large a sum of money. On objection of Respondent that the letter was self-serving, it was excluded from evidence (R. 72-73).

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In refusing to sustain, and in thereby overruling, Petitioner's contention that the introduction in evidence by Respondent of statements made by Petitioner to Revenue Agents under compulsion of Federal criminal statutes and the introduction of testi-

mony of the Agent concerning failure of Petitioner to disclose facts amounted to compelling Petitioner to be a witness against himself in violation of the Fifth Amendment to the Constitution of the United States and to a denial to Petitioner of the protection against self-incrimination pledged to him by the amendment.

2. In refusing to sustain, and in thereby overruling, Petitioner's contention that introduction in evidence by Respondent of testimony concerning the contents of records which Petitioner, under compulsion of Federal criminal statutes, kept and submitted to Revenue Agents for examination amounted to compelling Petitioner to be a witness against himself in violation of the Fifth Amendment to the Constitution of the United States and a denial to Petitioner of the protection against self-incrimination pledged to him by the amendment.

3. In refusing to sustain, and in thereby overruling, Petitioner's contention that Respondent's obtaining of information from Petitioner under authority of Federal criminal statutes which required Petitioner to give Respondent's agents information, and the agents obtaining knowledge of the contents of Petitioner's records under compulsion of Federal criminal statutes, and the use in evidence by Respondent of such information and knowledge, amounted to an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States.

4. In refusing to sustain, and in thereby overruling, Petitioner's contention that he was deprived

of the right against self-incrimination secured to him by the Fifth Amendment to the Constitution of the United States by reason of the trial Court's conditioning, upon Petitioner's first testifying as a witness, Petitioner's right to prove by his witness Dreeben that some years prior to any investigation of Petitioner's income tax returns, Petitioner had stated to the witness that income received by Petitioner from his pineapple business was not subject to Federal income tax.

5. In refusing to sustain, and in thereby overruling, Petitioner's contention that the trial Court, after Respondent had proved that soon after the indictment was returned Petitioner made a remittance of $260,106.15 to the local Collector of Internal Revenue, erred in refusing to permit Petitioner to introduce in evidence the letter which accompanied the remittance.

6. In refusing to sustain, and in thereby overruling, Petitioner's contention that the trial Court erred in refusing to give in charge to the jury Petitioner's timely made and properly presented request for an instruction on the law of circumstantial evidence.

7. In refusing to sustain, and in thereby overruling, Petitioner's contention that the trial Court erred in permitting Respondent to prove that Petitioner's brother-in-law did not report for income tax purposes sums of money withdrawn by him from Petitioner's business.

8. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I.

Petitioner's contention that the introduction in evidence by Respondent of statements made by him to Revenue Agents under compulsion of criminal statutes and the introduction in evidence by Respondent of testimony concerning the contents of records which he kept and submitted to Revenue Agents under compulsion of criminal statutes amounted to his being denied protection against self-incrimination and against being compelled to be a witness against himself, secured to him by the Fifth Amendment to the Constitution of the United States, presents a Federal question of substance not heretofore determined by this Court, and it is an important question of Federal law which should be settled by this Court.

Petitioner's contention that the introduction in evidence by Respondent of testimony concerning the contents of records which he kept and submitted to Revenue Agents under compulsion of criminal statutes amounted to his being denied the protection against unreasonable searches and seizures, secured to him by the Fourth Amendment to the Constitution of the United States, presents a Federal question of substance not heretofore determined by this Court, and it is an important question of Federal law which should be settled by this Court.

Persons subject to the income tax statutes are required to keep records and disclose facts bearing upon their income tax liability for the purpose of enabling the Government through resort to civil

process to enforce its right to the payment of taxes that are due. For this purpose the Commissioner and his agents are authorized to examine a taxpayer's books and records and to take statements from him concerning his tax liability. (Appendix 79-80.)

The scope of the privilege against self-incrimination and the proper method of affording its benefits to a taxpayer in the light of Section 145(a) of the Code, which section prescribes fine and imprisonment for wilful failure to furnish information or to submit books or records, is a question never determined by this Court. Nor has the fact that Sections 3614(a), 3615 (a) and 3616(b), giving authority to compel testimony and the furnishing of books and records, and providing punishment for non-compliance are by their terms confined to the civil purposes of ascertaining and collecting the tax, and of necessity must be so construed to be valid, been heretofore determined by this Court in relation to Section 145(a) and with respect to the bearing of all of such statutes on the question of self-incrimination. Involved in the determination of these issues is the consideration of the position in which a taxpayer is placed of being exposed on the one hand to prosecution and conviction for wilful failure to submit to examination under Section 145(a) should his claim of privilege be held to be without basis; and, on the other hand, of having to resort to the necessity of incriminating himself by his own testimony in order to show that the claim of privilege was well founded.

This fundamental problem has not been considered by this Court nor do any of the reported cases indicate that either this Court or any other court has

passed upon the points here made and arguments in support thereof.

An integral part of the questions here urged is whether or not it is necessary to the admissibility of an incriminating statement obtained by an officer from an accused that it be shown that the accused was first warned of his constitutional right to refrain from giving evidence of an incriminating nature. The general rule is that such a warning is not required. A question here is whether or not it is required under the peculiar provisions of the income tax law as an essential before it can be contended that the accused has voluntarily waived his right against self-incrimination and to the validity of the statutes themselves.

One question here involved is the privileged status of private books, records and papers kept by a taxpayer in his business transactions, as distinguished from the status of books and records required to be kept under statutes regulating a particular business, such as was considered in *Shapiro vs. United States*, 335 U. S. 1, and related cases. As a separate and distinct question, the privileged status of **oral testimony** before the agent consisting of affirmative statements, as well as failure to disclose, is presented to this Court for the first time. Circuit Judge Rives, in his dissent, has held that Petitioner's privilege against self-incrimination was violated.

II.

Petitioner's contention that he was deprived of his right against self-incrimination secured to him by the Fifth Amendment to the Constitution of the United States by reason of the trial Court's condi-

tioning, upon Petitioner's first testifying as a witness, Petitioner's right to prove by the witness Dreeben that some years prior to any investigation of Petitioner's income tax returns, Petitioner had stated to the witness that income received by Petitioner from his pineapple business was not subject to Federal income taxes, presents a Federal question of substance not heretofore determined by this Court and one that should be settled by this Court; and the holding of the trial Court on the question as to the admissibility of the Dreeben testimony when first offered is probably in conflict with the decisions of the Court of Appeals for the Tenth Circuit.

The testimony was admissible (*Miller vs. United States*, 120 Fed. (2d) 968, 970 (10th Cir.); *Haigler vs. United States*, 172 Fed. (2d) 986 (10th Cir.). Petitioner's right to offer it should not have been conditioned on Petitioner's first having taken the witness stand.

III.

The holding that the letter which accompanied and explained the remittance of $260,106.15 made by Petitioner to the local Collector of Internal Revenue shortly after the return of the indictment, was not admissible in evidence is probably in conflict with the applicable decisions of this Court.

In *Crawford vs. United States*, 212 U. S. 183, when the Government had offered in evidence a letter written by a Government witness making charges against the defendant, a reply by the defendant, written by his attorney, was held admissible in evidence, and the fact that the defendant later testified did not cure the error in excluding the letter.

Circuit Judge Rives, in his dissent, holds the exclusion of Petitioner's letter to have been prejudicial error. Circuit Judge Russell agreed that the exclusion was erroneous but held the error to be without prejudice for a reason expressly disapproved in the *Crawford* case.

IV.

The holding that Petitioner was not entitled to an instruction on the law of circumstantial evidence is in conflict with prior holdings of the Court of Appeals for the Fifth Circuit and with decisions of other Courts of Appeals on the same subject. (*Weiss vs. United States*, 122 Fed. (2d) 675 (5th Cir.), cert. denied 314 U. S. 687; *Hubby vs. United States*, 150 Fed. (2d) 165 (5th Cir.); *Strickland vs. United States*, 155 Fed. (2d) 167 (5th Cir.); *Garrison vs. United States*, 163 Fed. (2d) 874 (5th Cir.); *Bryan vs. United States*, 175 Fed. (2d) 223 (5th Cir.), affirmed 338 U. S. 552; *McCoy vs. United States*, 169 Fed. (2d) 776, 785-786 (9th Cir.); *Graves vs. United States*, 191 Fed. (2d) 579, 582 (10th Cir.); *Morgan vs. United States*, 159 Fed. (2d) 85, 87 (10th Cir.); *United States vs. Laffman*, 152 Fed. (2d) 393 (3rd Cir.); *United States vs. Tatcher*, 131 Fed. (2d) 1002 (3rd Cir.); *Ridenour vs. United States*, 14 Fed. (2d) 888 (3rd Cir.).

The trial Court affirmatively charged on the defense of mistake and good faith belief, and the correctness of the holding of the Court of Appeals that the verdict of guilty by the jury showed that the jury did not believe that reasonable hypothesis of innocence existed is a new question before this Court. Likewise, the holding of the Court of Appeals that

Petitioner's contradictory statements, seeming unwillingness to answer fully, and attempts to place responsibility for discrepancies on his bookkeeper constituted direct evidence as distinct from circumstantial, and dispensed with the necessity for the circumstantial evidence charge, raises a question of substance which has not received the attention of this Court.

V.

The holding that testimony showing that Petitioner's brother-in-law did not report for income tax purposes sums of money withdrawn by him from Petitioner's business is an error that so far affects the judgment of conviction, that in common justice the judgment should be reversed.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

JOSEPH JACOB BARSHOP,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals on original submission is reported,—*Joseph Jacob Barshop vs. United States*, 191 Fed. (2d) 286. The majority opinion and dissenting opinion on motion for rehearing, presently not reported, are printed in the appendix, *post*, 67-77.

II.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) by petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, timely filed, in a criminal case in which said Court of Appeals has rendered final judgment.

III.

STATEMENT OF THE CASE

Petitioner is charged by an indictment of five counts with having "wilfully and knowingly" attempted, in violation of Section 145(b) of Title 26, United States Code, 1946, to defeat and evade payment of a part of the taxes due by him for the years 1942, 1943 and 1944, and of a part of the taxes due by his wife for the years 1943 and 1944.

In attempting to establish the alleged violations, Respondent introduced in evidence the separate tax returns of Petitioner and his wife; proved that a few days after the indictment was returned, Petitioner made a remittance of $260,106.15 to the local Collector of Internal Revenue; and then offered testimony showing, or designed to show, (1) that Petitioner had income in a substantial amount from a pineapple business conducted by him and others which involved the sale, partly out of Nuevo Laredo, Mexico, and partly out of Laredo, Texas, of pineapples produced in Mexico and shipped to Petitioner

at either Nuevo Laredo, Mexico, or Laredo, Texas; (2) that such income from this source was not reported in his returns (R. 104-105, 137, 245, 257-266, 281-282, 295-297, 269-276, 722-728); (3) that there had been a substantial increase in Petitioner's net worth over the period covered by the indictment (R. 144-151); (4) that in addition to the income from the pineapple business there were other items of unreported income (R. 228-229, 322-326, 331-338, 349-355, 358, 363-365, 369-375, 376-380, 396-401); (5) that there were mistakes and errors of addition in Petitioner's record of sales from his business conducted under the name of Banana Distributing Company (R. 228-229, 458-459); (6) that in tax returns claims were made for deductions which Revenue Agents considered improper (R. 228-229, 322-326, 331-338, 349-355, 358, 363-365, 369-375, 376-380, 396-401); and (7) that the purpose of four checks, hereafter more specifically mentioned, (among the very large number issued over the years) were not correctly stated on the check stubs (R. 107-110, 112-116, 121-129, 130-132, 337-339, 348-353, 370-375, 389-390, 468-473).

In addition to the above, in an effort to establish by circumstantial evidence that Petitioner acted **wilfully and knowingly,** Respondent attempted to show that, when interviewed by Agents of the Bureau of Internal Revenue, Petitioner (1) did not correctly state the number of banks in which he carried accounts or had carried accounts (R. 236-237, 241, 242, 294); (2) did not correctly state the number of pieces of real estate that he had purchased (R. 229, 457); (3) did not correctly state the source of cer-

tain bank deposits and that those deposits did not involve income (R. 229-230, 236-237); (4) did not correctly state the purpose for which certain checks were issued (R. 287-288, 292, 316, 319, 320-321, 340-341, 344, 463); (5) falsely claimed that he had been allowed to use money that belonged to Alonzo Isla, a person who lived in Mexico and with whom Petitioner contracted in connection with Petitioner's pineapple business (R. 229-230, 311-314, 459). It was conclusively shown that Petitioner told the truth in stating that he used Isla's money with Isla's consent (R. 721-722, 729-731).

In furtherance of the effort to show "wilfulness" upon the part of Petitioner, testimony was offered by Respondent to show (1) that Petitioner's sales as listed on daily sales lists did not agree with the sales journal (R. 228-230); (2) that Petitioner, when interviewed by Government agents, did not at once tell them about his pineapple business (R. 238, 242); (3) that records of the pineapple business were not maintained in the United States (R. 266-267, 765-769)—there was a record in the Laredo bank account of Petitioner's receipts from that part of his business; (4) that Petitioner did not tell the Agents of the Bureau of Internal Revenue of the written contract between Petitioner and Isla, a citizen and resident of Mexico, under which Petitioner's pineapple business was conducted (R. 269-278, 599-600); (5) that the Mexican Banana Company, a partnership of which Petitioner was a member, was engaged in importing bananas and filed a partnership income tax return (R. 521-530); (6) that a "counter check" drawn in favor of Mexican

Banana Company was later erroneously noted on the check book as having been issued to buy bananas, when it was issued to supply money in a farming venture (R. 389-390, 468-473); (7) that a "counter check" issued in connection with a loan later was erroneously noted on the check book as having been issued for the purchase of pineapples (R. 106, 109, 130); (8) that a "customer's draft" later was noted on the check book as having been issued for the purchase of pineapples (R. 106, 109, 130); (9) that a "customer's draft" later was noted on the check book as having been issued for the purchase of pineapples (R. 109, 121, 123, 130-131, 498-501); (10) that a check written on a check form of a Brownsville bank, payable to Mexican Banana Company, was noted on the check book by a person other than Petitioner as having been issued for the bananas, when in fact it was issued as a loan (R. 114, 116, 127-129, 132).

The above and other circumstances relied upon by Respondent were explained in a manner consistent with innocence and inconsistent with guilt (R. 106-111, 112-116, 119, 120-129, 131-132, 228-229, 322-336, 331-338, 346-347, 349-355, 361-365, 366-380, 388-396, 396-403; 458-459; 158-160; 632-634; 670-679, 685-693; 862-864; 248-259; 457; 229-230; 730; 90, 92-93, 95, 98-100, 104, 135-137, 779-780, 783-784, 806-807, 846-847; 287-288, 316-321). For example, the above mentioned entries made on the check book were explained and shown to be mistakes (R. 106-111, 120-127, 352, 119, 353; 131, 455, 346-347, 509, 350-351; 112-116, 128-129; 388-403, 495, 851-852). The loan which was made by one of the above mentioned checks was repaid the next year and

the money received in repayment was reported as income and taxes paid on it (R. 128-129).

It is not disputed that Petitioner had a substantial amount of income from his pineapple business which was conducted partly in Nuevo Laredo, Mexico, and partly in Laredo, Texas, or that this income was not reported in the income tax returns. Earnest, who prepared and filed the income tax returns, introduced as a witness by the Government, testified that he knew that Petitioner had income from this source; that it was "a Mexican proposition and that he" did not think it was necessary to report it (R. 89-90, 103-105, 137).

Petitioner believed that the income received in his Mexican pineapple business was not subject to income taxes (R. 215-220, 805-809), and he had been so informed by others (R. 611-614, 618-627, 628-632, 632-634, 673-679, 689-692).

The errors assigned in paragraphs 1, 2 and 3 of the Specifications of Error set out below are based upon what Petitioner believes was a violation of rights secured to him by the Fourth and Fifth Amendments to the Constitution of the United States. An Internal Revenue Agent was assigned to "inspect" Petitioner's books and records. This was under authority of statutes that authorize such examinations and the taking of statements from taxpayers for the purpose of determining the amount of taxes due the Government and enforcing the right of the Government to payment thereof. Failure to furnish information when requested is made a criminal offense. The Revenue Agent examined Petitioner's books and records, and interviewed Peti-

tioner with respect to his books, records and income (R. 225-230, 236-247). He was permitted to testify, over Petitioner's objection, to the contents of Petitioner's books and records and to statements made by Petitioner during the interviews (R. 247-298).

Respondent largely relied upon the testimony of a Revenue Agent to prove the case (R. 247-298). In the majority opinion of the Court of Appeals what Petitioner told the Revenue Agents and what he failed to tell them were treated as circumstances pointing to guilt (Appendix 49-65, 56, 61, 62). On rehearing Judge Rives dissented from the original opinion in which he had joined, and pointed out that it was not shown that Petitioner had intentionally waived his right against self-incrimination or that either the express admissions or those arising from Petitioner's silence were, in fact, voluntary.

Another contention to the effect that Petitioner was denied a right secured to him by the Fifth Amendment to the Constitution of the United States arises from the holding that the witness Dreeben was not allowed to testify that at a time shown to be prior to the commencement of the investigation of Petitioner's income tax returns involved in this case, and possibly prior to the filing of one or more of them (R. 699), Petitioner had told the witness of Petitioner's pineapple business and that his income from that business was not subject to income taxes, unless the Petitioner had first testified to his good faith belief that his pineapple income was not taxable. At the time the trial Court made the ruling, the Court understood from Petitioner's counsel that Petitioner would testify (R. 1206-

1207). One of Petitioner's counsel had told the trial Court prior to the time Dreeben was first offered as a witness that he intended to put Petitioner on the witness stand (Supplemental R. 2).

Petitioner offered a letter in explanation of testimony offered by Respondent as an incriminating circumstance. The trial Court sustained an objection to Petitioner's offer. Two of the Circuit Judges were of the opinion that the letter was admissible evidence, but only one of the two thought it prejudicial error to exclude it. This ruling is the basis of one of the specifications of error here presented.

Respondent had proved that on October 18, 1948 (the indictment was returned on October 4, 1948,—R. 2), a remittance from Petitioner in the sum of $260,106.15, accompanied by a letter from Petitioner (R. 71) was received by the Collector of Internal Revenue or the Deputy Collector, and that the money so received had since been held in the "suspense account" (R. 63-65). Petitioner offered to introduce in evidence the letter which accompanied the remittance (R. 72). Objection by counsel for Respondent that the letter was self-serving was sustained over Petitioner's contention that, Respondent's having gone a part of the way into the transaction, Petitioner was entitled to offer the letter in evidence as a part of the transaction (R. 72-73). The letter explained the purpose of the remittance and denied any inference of guilt that might have been inferred from the bare fact that the remittance was made, and stated that the indictment was the first notice he had had of the amount claimed to be owing and that

he would have paid such taxes before had the government notified him of the amount (R. 73-74).

The contention that it was prejudicial error to refuse to instruct the jury on the law of circumstantial evidence arises from the facts (1) that the prosecution depended entirely upon circumstantial evidence to prove the essential element of "wilfulness," with the result that the prosecution relied upon circumstantial evidence alone to prove the guilt of the Petitioner, and (2) that Petitioner requested that the jury be instructed on the law of circumstantial evidence and tendered a correct and approved charge.

A part of the testimony offered against Petitioner was that checks totaling $94,999.70 were drawn on Petitioner's Laredo bank account by Markusfeld in favor of the latter, and that Markusfeld did not report the same as income in his return. Markusfeld was a brother of Petitioner's wife. One of the specifications of error is based upon the error committed in admitting such testimony in evidence.

IV.

SPECIFICATIONS OF ERRORS

The Court of Appeals erred:

1. In overruling Petitioner's contention that the introduction in evidence by Respondent of statements made by Petitioner to Revenue Agents under compulsion of Federal criminal statutes and the introduction of testimony of the agent concerning failure of Petitioner to disclose facts amounted to compelling

Petitioner to be a witness against himself in violation of the Fifth Amendment to the Constitution of the United States and to a denial to Petitioner of the protection against self-incrimination pledged to him by the amendment.

2. In overruling Petitioner's contention that introduction in evidence by Respondent of testimony concerning the contents of records which Petitioner, under compulsion of Federal criminal statutes, kept and submitted to Revenue Agents for examination amounted to compelling Petitioner to be a witness against himself in violation of the Fifth Amendment to the Constitution of the United States and a denial to Petitioner of the protection against self-incrimination pledged to him by the amendment.

3. In overruling Petitioner's contention that Respondent's obtaining of information from Petitioner under authority of Federal criminal statutes which required Petitioner to give Respondent's agents information, and the agents' obtaining knowledge of the contents of Petitioner's records under compulsion of Federal criminal statutes, and the use in evidence by Respondent of such information and knowledge, amounted to an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States.

4. In overruling Petitioner's contention that he was deprived of the right against self-incrimination secured to him by the Fifth Amendment to the Constitution of the United States by reason of the trial Court's conditioning, upon Petitioner's first testifying as a witness, Petitioner's right to prove by his

witness Dreeben that some years prior to any investigation of Petitioner's income tax returns, Petitioner had stated to the witness that income received by Petitioner from his pineapple business was not subject to Federal income tax.

5. In overruling Petitioner's contention that the trial Court, after Respondent had proved that soon after the indictment was returned Petitioner made a remittance of $260,106.15 to the local Collector of Internal Revenue, erred in refusing to permit Petitioner to introduce in evidence the letter which accompanied the remittance.

6. In overruling Petitioner's contention that the trial Court erred in refusing to give in charge to the jury Petitioner's timely made and properly presented request for an instruction on the law of circumstantial evidence.

7. In overruling Petitioner's contention that the trial Court erred in permitting Respondent to prove that Petitioner's brother-in-law did not report for income tax purposes sums of money withdrawn by him from Petitioner's business.

8. In affirming the judgment of the District Court.

ARGUMENT

I.

USE OF INTERNAL REVENUE AGENT'S TESTIMONY A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS

The Internal Revenue Code requires that every individual who has a gross income of $600 or more

shall make an income tax return, and provides that the Commissioner of Internal Revenue shall have power (1) to require persons liable for income tax to keep records, render statements under oath, make returns and comply with rules and regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, and (2) **"for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made,"*** to examine, by an officer or employee of the Bureau, including the field service designated by him for that purpose, "any books, papers, records, or memoranda bearing upon the matters required to be included in the return," and to take testimony of the person rendering the return "with reference to the matter required by law to be included in such return." (Appendix 79-80.)

The remedy afforded by the above stated statutes is civil in nature and intended to be used only to determine the amount of taxes due the Government and to enforce by civil proceedings the payment of such taxes. The Congress has specifically limited their use to (1) "the purpose of ascertaining the correctness of any return" and (2) "the purpose of making a return where none has been made." Even without such clear limitations upon the purposes for which said statutes may be used, unless they were so construed, and particularly in view of the provisions of Section 145(a) of the Revenue Code, they would be invalid because of incompatability with the Fifth Amendment.

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* All emphasis supplied.

There is not anything in these statutes which suggests an intent that the powers there granted may be used for the purpose of accumulating information and evidence to be used in the prosecution of criminal cases. Following this Court's decision in *Counselmen vs. Hitchcock*, 142 U. S. 547, in every instance in which the Congress has attempted by statute to compel persons to give testimony notwithstanding the guarantees of the Fifth Amendment, Congress has given to persons so compelled to testify full immunity from prosecution. This has been necessary under the principle established by the decisions of this Court that "full and complete immunity against prosecution by the Government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination" (*United States vs. Murdock*, 284 U. S. 141, 149), and anything that falls short of that measure does not meet the requirements of the Fifth Amendment. In order to enact a valid compulsory testimony statute, the Congress must either grant full immunity from criminal prosecution on testimony so obtained, or limit the use of such testimony to civil proceedings. Congress knew at the time the above stated statutes were enacted what was essential to the validity of a statute designed to compel self-incrimination, and if Congress had intended that these statutes be used for the purpose of compelling persons to give evidence of an incriminating nature, in keeping with the practice of Congress, it would undoubtedly have made provision for immunity to persons so compelled to testify.

Section 145(a) of the Code is designed to make

effective the lawful demands made by the Commissioner and his agents in the exercise of the powers vested in them by the above statutes. It provides that "Any person required * * * to * * * keep any records or supply any information **for the purposes of the computation, assessment or collection of any * * * tax imposed by this chapter** who willfully fails to * * * supply such information at the time or times required by law or regulations shall * * * be guilty of a misdemeanor * * *" (Appendix 83).

When a taxpayer, like Petitioner, is called upon under these statutes to submit his books and records for examination by a Revenue Agent and to give information to the Agent, such taxpayer has the right to believe and proceed upon the belief that the powers vested by the stated statutes are being exercised only for the purpose of enforcing civil liability for taxes that are due the Government.

If the statutes which impose upon persons who have a gross income of $600.00 or more during the taxable year a duty to keep books and records, to submit their books and records for examination at the order of the Commissioner or his agents, and to supply information to the Commissioner and his agents are construed as designed to give those officers power to compel the disclosure of violations of the criminal sections of the Revenue Code by the person under examination, those statutes are obviously in conflict with both the Fourth Amendment and the Fifth Amendment. This is particularly true in view of the fact that Section 145(a) provides that criminal punishment may be imposed for the "wilful"

failure to supply information. So construed, certain of the statutes would compel a taxpayer to record his acts and to disclose them to Government officers for the purpose of criminal prosecution. Another statute (Sec. 145a) provides that fine and imprisonment may be imposed for failure to obey the demands made by officers acting under the other. To be sure the taxpayer may refuse to make disclosure and base his refusal upon the constitutional guarantee against being compelled to be a witness against himself. But, that claim will not prevent his being called to answer an indictment drawn under Section 145(a). The right of a taxpayer to refuse to disclose, it appears, may be tested in the trial of a prosecution instituted against him under Section 145(a). (*United States vs. Murdock*, 284 U. S. 141, 148, 150.) He can defend against the charge of "wilful" failure to furnish his records and information on the ground that they might incriminate him, but in making the defense the circumstances may compel him to do that which he sought to avoid by refusing to make a disclosure to the Commissioner or his agents. This situation could arise in the case of any taxpayer who had wilfully attempted to defeat payment of income taxes due.

The Fifth Amendment in so far as it offers protection against self-incrimination was not intended any more for the protection of the innocent than for the protection of the guilty. The innocent do not need its protection; the guilty do.

To sustain the validity of these statutes it is necessary either (1) that there be found in them a congressional intent that facts developed by use of the

power they vest shall be used only in enforcing against the taxpayer the civil obligation to pay any tax found to be due, and that no criminal prosecutions shall follow from such enforced disclosures; or (2) that, if resort is had to them for the purpose of developing criminal action against the person examined, no facts so obtained shall be admitted in evidence on the trial of any case so developed unless it is shown that such person was warned of his right to refuse to submit to examination; after which his submitting to examination may be accepted as willing and as a waiver of his rights under the Fifth Amendment.

Petitioner, at the request of Revenue Agent Grossnickle, in the absence of any statement that the purpose of the examination was one beyond the terms of the stated statutes, was required by those statutes to submit his books and records and himself for examination. Failure to comply would have been a criminal offense, complete with the failure (*United States vs. Murdock*, 284 U. S. 141), subject only to the defense that the failure was not wilful.

If the Commissioner or his agents are exercising powers vested by the above stated statutes with the view of obtaining under their compulsion information and evidence to be used in prosecuting the taxpayer on criminal charges, they rest under an absolute duty to so inform the taxpayer and advise him that he has a right to refuse to submit any records or to make any statements that would be incriminating in nature. Unless the taxpayer under such circumstances is advised of the purpose of the examination and of his right to refuse to be made a witness

against himself, then it cannot be said that the taxpayer has voluntarily submitted to the examination. Use by a Government Agent of the powers vested by the above statutes, with the view of developing testimony for use in the prosecution of a criminal case against the person examined, without informing such person of the purpose of the examination, destroys any reasonable basis for any view or holding that a compliance with the demands of the Agent under such circumstances is voluntary and a waiver of the right against self-incrimination.

Where the purpose of the examination conducted under these statutes is to develop information for use in a criminal prosecution against the person examined, and he is not at the time advised of such purpose or of his right to refuse to submit to examination, objection made upon trial of the criminal case to introduction in evidence of information so obtained should, under the stated circumstances, be considered timely. This is because at the time of the examination the defendant on trial did not know the purpose of the examination, he had a right to believe that it was for the purpose provided in the statutes, he was under the compulsion imposed by Section 145(a) of the Code, and the offer in evidence of information so obtained would be his first certain knowledge that such information was to be used against him in a prosecution for crime.

Judge Rives has rightfully said in this case that Petitioner's submission to examination by Agent Grossnickle was not shown to be voluntary.

Whatever may be the legal requirement with respect to warning in other connections, and in pass-

ing it may be noted that the propriety and fairness of warning are strongly indicated in all situations, we respectfully submit that by virtue of the express limitations contained in the compulsory testimony provisions of the income tax law and by virtue of the limited construction which must be given them to sustain their validity, an absolute requirement of warning in income tax investigations should be established by this Court under these statutes.

A citizen who has a choice of incriminating himself or standing trial for the criminal offense of failing to do so, should be warned of his rights before being forced to the choice.

It is particularly noteworthy in the case at bar that about a month after the commencement of the investigation of Petitioner's income tax affairs and after Agent Grossnickle had already required Petitioner to submit his books, records, and papers and to submit to personal examination by him, and after he had developed facts that were later used to secure a conviction, Sharp, one of the agents, then saw fit to warn Petitioner of his rights with respect to furnishing information (R. 233-234, 243-244). The record, however, shows conclusively that the books and records which Grossnickle examined in the first few days and the leads he got from them and particularly his oral examination of Petitioner, including what Petitioner told him as well as what he alleged Petitioner failed to disclose, constituted the primary information upon which the Government built its case (R. 224, 230, 343-344, 454-456). Furthermore, it appears that the information which was quoted by Agent Grossnickle as having been

given after Petitioner was warned was not enough to justify a conviction, if it can be called incriminating (R. 244-247, 250, 266-267, 279-285, 347-350, 351-352, 452-456, 829-830, 893-894, 927). In all events and beyond any doubt whatsoever, Grossnickle's testimony relating to his conversations with Petitioner before he was ever warned were vital to the Government's case. The Circuit Court, in its original opinion, in holding the evidence sufficient to sustain the conviction takes particular note of the testimony of Agent Grossnickle relating to his initial conversations with Petitioner.

The agent Grossnickle testified both as to statements made by Petitioner to him, including his failure to make certain disclosures, and as to the contents of books and records supplied to him by Petitioner. Any statements made by Petitioner to the agent Grossnickle and any testimony of the agent respecting non-disclosures are obviously within the scope of the privilege against self-incrimination. We submit that the privilege would likewise extend to Petitioner's books and records. *Shapiro vs. United States*, 335 U. S. 1, is not contrary to this position. In that case the Court did nothing more than apply to books and records required to be kept under the Emergency Price Control Act the principle declared in *Wilson vs. United States*, 221 U. S. 361, and later affirmed in *Davis vs. United States*, 328 U. S. 582, 589, 590, to the effect that the privilege which exists as to private papers does not relate to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulations

and the enforcement of restrictions validly established."

The books and records which individuals are required to keep in order to permit the enforcement of legislation regulating a business, as was the situation in the *Shapiro* case and in the *Davis* case, fall in an entirely different category from the private books, records and papers of an individual reflecting his business transactions and income.

It may be considered that the general question here raised was decided adversely to Petitioner's contentions in *Hanson vs. United States*, 186 Fed. (2d) 61 (8th Cir.), and *Nicola vs. United States*, 72 Fed. (2d) 780 (3rd Cir.), but it does not appear from the opinions in either of those cases that the Court there had before it or considered the arguments here presented by this Petitioner and no case has been found after extensive research that denies the validity or questions the correctness of the reasoning and arguments here presented.

II.

CONDITIONING ADMISSION OF DREEBEN TESTIMONY ON PETITIONER'S TAKING STAND AS VIOLATION OF CONSTITUTIONAL RIGHTS

The testimony of the witness Dreeben referring to a conversation with Petitioner which occurred long prior to the investigation of Petitioner's income tax affairs and possibly prior to the filing of one or more of the returns, in which conversation Petitioner advised Dreeben that his pineapple income was not taxable, was clearly admissible on the issue of Peti-

tioner's good faith belief as to the non-taxability of such income. 22 *Corpus Juris*, 279, 281; 31 *Corpus Juris Secundum* 1009; *Miller vs. United States* (10th Cir.), 120 Fed. (2d) 968; and *Haigler vs. United States* (10th Cir.), 172 Fed. (2d) 986. Accordingly, the premise is established that, under the Court's erroneous ruling, in order to secure the benefit of competent material evidence it was necessary that Petitioner take the witness stand. Further, it is implicit in the ruling of the Court that the issue of good faith belief as to the non-taxability of the pineapple income **could only be raised by Petitioner's testimony,** after which the testimony from other witnesses would be admissible by way of corroboration. Therefore, unless Petitioner took the stand he could not put the issue of good faith belief before the jury and, presumably, would not receive the benefit of an affirmative charge to the jury on such issue.

The Court of Appeals rejected Petitioner's claim that the ruling on the Dreeben testimony placed Petitioner under compulsion with respect to his taking the witness stand. It is first asserted that Petitioner's claim is defeated by the fact that one of his counsel, at the commencement of the trial and in reply to a question by the Court as to how long the trial would probably take, stated that he intended to put Petitioner on the stand. Petitioner's privilege could be waived only by his actually taking the witness stand voluntarily and free of compulsion. Such being the case, the trial Court was not entitled, in making his ruling, to assume that Petitioner would take the stand. The making of such assumption by the trial Court did not mitigate the

compulsion placed on Petitioner by the ruling, if Petitioner were to have the benefit of Dreeben's testimony. There is no question of invited error involved. The trial Court was bound to know that Petitioner did not have to take the stand unless and until he chose to do so.

The Court of Appeals has concluded "that as a matter of fact the defendant took the witness stand voluntarily, in accordance with his intention previously announced by counsel, and not because of the ruling of the Court with respect to the testimony of Dan Dreeben." There is no warrant for this holding in the light of the record fact that under the erroneous ruling of the Court, Petitioner could not obtain the benefit of the Dreeben testimony, could not raise his issue of good faith before the jury, or secure an affirmative defense thereon, unless he took the stand.

The issue presented is one which apparently has not heretofore been ruled upon by this Court. There are, however, two decisions: *McKnight vs. United States* (6th Cir.), 115 Fed. 972, and *Powell vs. Commonwealth of Virginia*, 189 S. E. 433, by the Supreme Court of Virginia, approving essentially the same principle for which Petitioner here contends. Each of those cases approves the proposition that an accused's privilege against self-incrimination is violated where, because of some incident in the trial, the accused is forced to testify to avoid the adverse consequences. In each of such cases the accused, in the presence of the jury, was called upon to produce certain incriminating documents. Such unauthorized demand placed the accused in the position of

either having to produce the documents or take the stand and explain his failure to produce them. It was held that the subsequent taking of the stand by the accused did not operate as a waiver of the privilege. In the *Powell* case the Court expressly held that it made no difference that counsel for the accused had previously stated his intention of calling him as a witness.

The issue presented is of vital importance to many taxpayers charged with wilful evasion. In many cases of admitted non-payment of tax, the issue is whether the non-payment was wilful or through good faith mistake. The privilege against self-incrimination loses its force if an accused may be placed in the position of having to take the stand in order to secure testimony other than his own, bearing on the only possible defense which he has to the charge of wilfullness. It cannot reasonably comport with the full recognition of the privilege to sanction a procedure which authorizes either a trial or appellate Court to speculate as to compulsory effect of an erroneous ruling of the Court on so fundamental and vital an issue.

On rehearing the Court of Appeals held in effect that it was incumbent upon Petitioner to make objection and take exception to the Court's ruling on the ground that it was prejudicial to his constitutional rights and would force him to take the stand. (It was not necessary to take an exception, Rule 51, Federal Rules of Criminal Procedure.) Petitioner urged upon the trial Court at the time the ruling was made that Dreeben's "testimony was admissible as bearing on the issue as to whether the de-

fendant, Barshop, in good faith believed that the pineapple income was not taxable, and that such declaration having been made prior to the commencement of an investigation was competent to show the defendant's state of mind with respect to his belief about the taxability of the pineapple income" (R. 1207). The trial Court stated that in his "opinion such testimony would not be admissible unless the defendant took the stand and testified to his good faith belief that his pineapple income was not taxable" (R. 1207). At the time the trial Court stated his reason for the ruling, the Court understood that Petitioner would testify in his own behalf (R. 1207). In connection with this matter the trial Court made an order correcting the transcript of the record and therein stated (R. 1217):

> "The Court's understanding that the defendant would take the witness stand is based upon the fact that he asked * * * Dan Moody, one of the counsel for the defendant, how long it would take to complete the trial of the case, and that said counsel replied that he couldn't tell; that he intended to put the defendant on the witness stand, and it would depend upon how long government's counsel cross-examined. This took place prior to the time that Dreeben was offered as a witness."

The effect of the Court's ruling, of necessity, was apparent to the Court. It deprived him of the right to first introduce the Dreeben testimony and then evaluate his case and determine the necessity of his

taking the witness stand himself in the light of such testimony.

III.

ERROR IN EXCLUSION OF EXCULPATORY LETTER

Proof that a few days after the indictment was returned Petitioner paid more than a quarter of a million dollars to the local Collector if unexplained was calculated to lead the jury to infer that Petitioner was confessing guilt. Of this evidence unexplained, Circuit Judge Rives has justly said: "thus striking a well nigh fatal first blow against the defendant." The explanation was at hand in the letter which accompanied the payment. The two were parts of one transaction. The letter was as much a part of the payment as the check that accompanied it. The Government itself concedes the evidentiary value of the letter to Petitioner in the fact that its sole objection to the letter was that it was self-serving. Judges McCord and Rives, in the Court's original opinion, agreed that the letter was self-serving and would be admissible only if "a part of the *res gestae* of the remittance." It was their original view that the main fact was the remittance, and the letter was not a part of the *res gestae*. Judge Rives, in dissenting on rehearing, disagreed with Judge McCord. In this connection he states:

> * * * "Our holding that the letter was not admissible in evidence as a part of the *res gestae* of the remittance was based upon

> a false premise that the remittance went only to prove that the defendant owed at least that amount in unpaid income taxes. In the trial, that fact never was actually in dispute. The defense urged was good faith, that the defendant's conduct was not a *wilful* attempt to defeat and evade income taxes. The unexplained remittance made only eleven days after the return of the indictment carried with it the strong inference that the defendant knew that he owed the income taxes but did not see fit to make the payment until the indictment was returned. The letter undertook to explain why the remittance was made at that time and was relevant to be considered upon the question of the defendant's good faith in not having made the payment earlier. The importance of the letter as evidence related not to the uncontested issue of indebtedness, but rather to the vital issue of good faith."

In his original concurring opinion, Judge Russell wrote that the ruling of the trial Court excluding the letter was erroneous but that "under the circumstances of this case, and especially because the defendant was permitted to testify to substantially the same facts as were stated in the letter" there was no prejudicial error. In his dissent on rehearing, Judge Rives in concluding that the exclusion of the letter was prejudicial error points out that Petitioner was never permitted to testify that he wrote the letter and that his testimony that the indictment was the first notice he had of the amount of the taxes and that he would have paid such taxes

before had the Government notified him of the amount might have been disbelieved by the jury, while the letter itself, if in evidence, might have been given weight.

As the case now stands, two of the Judges of the Court of Appeals are in agreement that the exclusion of the letter was error, and the view of Judge Russell, one of the two, that the ruling was without prejudice is based on the erroneous conclusion that the error was cured by the testimony of the Petitioner on the stand despite the admitted record fact that the contents of the explanatory letter which accompanied the remittance was not allowed to go to the jury. This issue is clearly controlled by the holding of this Court in *Crawford vs. United States*, 212 U. S. 183, 201-202:

> * * * "The defendant did on the trial testify to the same explanation as contained in the letter of his counsel, i.e., that Aspinwall in substance consented to the taking of the letters, but it is doubtful if such evidence cured the error of excluding the letter written at once after the accusation was made and long before the trial, in which letter he admitted and explained the taking, showing it was from no desire to suppress evidence, but, on the contrary, to preserve it."

The *Crawford* case deserves particular notice in connection with the comment of the majority of the Court of Appeals that "the self-serving letter was physically attached to the check in an obvious effort to secure its admission into the evidence." (Ap-

pendix 69.) In the *Crawford* case the defendant was accused of surreptitiously taking evidence which might be used against him in his trial, and a letter was written by the witness Aspinwall so charging him. In response to such letter the defendant, **acting by his counsel, replied, explaining** the circumstances under which possession was taken of certain evidence and the reasons therefor. In this connection this Court stated (212 U. S. 183, 200-201):

> * * * "The Court seemed to agree that if the answer had been made by the defendant personally, instead of by his counsel, it might have been admissible, but that as the defendant did not himself write the answer it could not be admitted. * * * So the defendant had the accusing letter put in evidence against him and was not permitted to have his answer, through his counsel, admitted in reply.
>
> * * *
>
> "We do not think that the letter written by counsel for the defendant was inadmissible. The defendant had in substance testified that it was written by his counsel, with his consent and by his direction. In other words, that counsel was acting simply as the agent and under the direction of his principal, the defendant in the case. It was not necessary that such letter should be written by the defendant personally, in his own handwriting. The importance of the matter lies in the fact that defendant, as soon as the accusation was made, had, through his counsel, acting under his direction explained the charge made of se-

cretly taking evidence which was in the hands of a third party, and which he feared might be used against him."

The holding of the Court of Appeals on the admissibility of the letter involved in this case is clearly in conflict with the holding of this Court in the *Crawford* case.

IV.

FAILURE TO GIVE CHARGE ON CIRCUMSTANTIAL EVIDENCE

Where the prosecution depends on circumstantial evidence to prove an essential element of a criminal case, the case depends on circumstantial evidence alone and a defendant upon request is entitled to a charge on the law of circumstantial evidence. This principle has been recognized by the Court of Appeals for the Fifth Circuit. *Thompson vs. United States* (5th Cir.), 145 Fed. (2d) 826; *Anderson vs. United States* (5th Cir.), 30 Fed. (2d) 485; *Crain vs. United States* (5th Cir.), 148 Fed. (2d) 615; *Tomplain vs. United States* (5th Cir.), 42 Fed. (2d) 205. In this case proof of "wilfulness" depended on circumstantial evidence. "Wilfulness" was an essential element of the case. (*Spies vs. United States*, 317 U. S. 492.) The result of the instruction was a denial of a valuable right.

We do not understand the Court of Appeals in the case at bar as in any wise disagreeing with the above statement of the law. Apparently the Court of Appeals treated what it termed "contradictory state-

ments in the defendant's answers" and Petitioner's "seeming unwillingness to answer fully the questions propounded to him and his attempt to explain all the discrepancies by placing the responsibility for them on his bookkeeper" as direct evidence (though at best only circumstantial) dispensing with the necessity of an instruction on the law of circumstantial evidence. If the test which the Court of Appeals here applies in distinguishing between direct evidence and circumstantial evidence were correct, the law of circumstantial evidence would have little or no place in our jurisprudence. The demeanor and conduct of an accused on the witness stand does not constitute direct evidence of guilt within the meaning of the law.

The Court of Appeals has held further that the giving of a charge on the affirmative defense of good faith belief and honest mistake dispenses with the necessity for a charge on the law of circumstantial evidence. The Court concludes that since the jury found the Petitioner guilty it, of necessity, would not have believed that any reasonable hypothesis of innocence existed. The view adopted by the Court would be equally true with respect to the usual charge on reasonable doubt even if the Court had failed to charge on an affirmative defense raised by the testimony. Any such argument is in complete disregard of the essence of the circumstantial evidence rule which requires the jury to test the circumstances in evidence by rules that have been developed for the purpose of avoiding convictions on testimony that raises a suspicion but does not reasonably exclude the hypothesis of innocence.

For the reasons here shown, Petitioner prays that writ of certiorari issue in this cause to the Court of Appeals for the Fifth Circuit and that upon hearing the judgment of the trial Court and the judgment of the Court of Appeals be reversed and the cause remanded to the District Court.

Respectfully submitted,

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APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 13142

JOSEPH JACOB BARSHOP,
Appellant,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Texas

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(August 22, 1951.)

Before McCORD, RUSSELL and RIVES, Circuit Judges.

McCORD, Circuit Judge: Joseph Jacob Barshop was indicted for a violation of Section 145(b) of the United States Code, 1946. The indictment contained five counts and charged that by filing and causing to be filed false and fraudulent income tax returns for the years 1942, 1943 and 1944 he wilfully and

knowingly attempted to defeat and evade a part of the income tax due by him for each of said years; and that by filing and causing to be filed false and fraudulent income tax returns for the years 1943 and 1944, he wilfully and knowingly attempted to defeat and evade a part of the income and victory taxes owed by his wife for the year 1943 and a part of the income tax owed by her for the year 1944.

The indictment was returned on April 4, 1948. The case was tried to a jury from January 2, 1949 through January 14, 1949. The jury found the defendant guilty on all five counts of the indictment. The record consists of two volumes and aggregates 1213 pages, and the briefs are voluminous.

Joseph Jacob Barshop was engaged in the wholesale and retail produce business with residence at San Antonio, Texas. He was sole owner of the Banana Distributing Company, of the Fruit Distributing Company and of a beer business, and was also engaged in importing pineapples in carload lots from Mexico. These pineapples were shipped to the board at Laredo, Texas and Nuevo Laredo, Mexico. When the cars arrived at the border loaded with pineapples, the defendant made payment therefor from different banks in Texas. The defendant had a brother-in-law who lived in Waco, Texas, and a large number of payments for pineapples were made by this brother-in-law through a bank there. It is without dispute that the defendant's income from pineapple profits mounted into hundreds of thousands of dollars.

In January of 1946 agents for the Government commenced an investigation of the defendant's in-

come tax returns. When the investigation began no information was given by the defendant touching his pineapple business. Moreover, the tax investigators were not informed of the different banks in which the defendant did business and kept accounts. It became necessary for the investigators for the Government to search out and ascertain the true facts touching nearly every phase of the defendant's business. The community net income of the defendant and his wife as determined by the net worth method exceeded that reported in the returns by $126,011.90 for 1942 , $122,294.65 for 1943, and $113,393.08 for 1944. By the profit and loss method also the government proved that the net taxable income of the defendant and his wife for the tax years involved was far in excess of that reported in the returns.

It is without dispute that the defendant received large sums by way of profit from his pineapple business, other than that reflected on the books of the Banana Distributing Company, and no part of which was returned for tax purposes for the years involved, and that no tax was paid thereon. This profit from his pineapple business amounted to a little over $400,000.00. In addition to this amount, adjustments made by the Revenue Agent increasing defendant's taxable income for the years involved other than from his pineapple income amounted to $192,-974.35.

It is further without dispute that defendant and his wife retained in their possession substantial unreported income upon which no taxes were paid. Therefore, in deciding whether or not there was substantial evidence warranting the submission of the

case to the jury for their determination, the only question to be determined is whether the defendant wilfully and knowingly attempted to evade taxes during the years here involved.

The defendant was the sole owner of the Banana Distributing Company and was a partner in the Mexican Banana Company. The Mexican Banana Company, we are impressed, reported its income accurately, which reports were prepared by other partners, but the returns of the Banana Distributing Company are replete with inaccuracies and errors, and fail to disclose and include profits from business transactions. One entry of the Banana Distributing Company shows that a check for $30,000.00 dated April 27, 1943, and signed by the defendant, was personally made by defendant and reflected the purpose for which the check was drawn as being "J. B. Exchange to buy pines in Mexico," whereas it was found that this amount represented a loan. Another entry in the records of the Banana Distributing Company shows a check for $20,000.00 dated April 26, 1943, signed by the defendant, whereon the corresponding stub, which was personally made by defendant, reflected the purpose for which the check was drawn as being "J. B. Exchange to buy pines in Mexico," when in fact, the amount of said check constituted a bank transfer of funds. Still another entry found in the records of the Banana Distributing Company and which entry was on the stub of a check for the amount of $10,000.00, dated November 18, 1943 and signed by the defendant, showed the purpose for which the check was drawn as being "Purchases," when in truth and in fact, the un-

disputed evidence shows that the amount of this check was a loan to the Mexican Banana Company, which was repaid in 1945. The effect of each of these entries was to reduce the defendant's net income for tax purposes for the year involved by a like amount. A long line of checks was shown to defendant as he testified and when confronted with entries which were erroneous he would explain to the jury that the mistakes were made by his bookkeeper.

A number of checks were made payable to Benny Markusfeld, a brother-in-law of the defendant, and which totaled $94,999.70. These checks were drawn on an account called the Joe Barshop Pineapple Account in the Laredo National Bank during the years 1943 and 1944. One of these checks was in the sum of $10,000.00 and was deposited to the Benny Markusfeld account in the Frost National Bank, San Antonio, Texas, August 14, 1942. Two checks in the amounts of $7,855.45 and $7,144.55 were deposited to Markusfeld's account in the First National Bank of Waco, Texas on August 17, 1942, and another in the sum of $5,000.00 was deposited in the Waco Bank on August 20, 1942. These checks totaled exactly $30,000.00. On August 10, 1943, there was deposited to the account of Benny Markusfeld on the National Bank of Commerce, San Antonio, Texas, a check in the amount of $23,229.10. On August 16, 1943, there was deposited to his account in the Waco Bank a check in the sum of $19,101.07. Two checks payable to Markusfeld, one in the sum of $18,028.08 and the other in the sum of $4,641.45, each being endorsed by Benny Markusfeld and Joe Barshop, were deposited to the account of Mary Barshop in

the National Bank of Commerce, San Antonio, Texas. In explaining these checks, the defendant first stated he had given these amounts to Mary Barshop. Later he stated the total amount of the two checks was the repayment of a $15,000.00 loan to Markusfeld and his wife's interest of approximately $7,000.00 in her mother's estate. These amounts appear nowhere on defendant's records or his tax returns, either as items of expense or income. They total $64,999.70 and were issued in 1943. The checks issued to Benny Markusfeld, the brother-in-law of the defendant, were defendant testified, given in payment of services rendered. The defendant had previously stated to the Agent that Markusfeld had no interest in the pineapple transactions and that he would assume that he drew the money to pay one Isla, a Mexican broker, from whom defendant purchased pineapples.

In explanation of why he did not make returns to the Government on the substantial profits made from the pineapple transactions, the defendant testified that he did not think that he owed taxes on money made on the pineapples which he purchased through Isla in Mexico. The court permitted defendant to testify at length that he had heard many persons say to him while in Mexico that he did not owe taxes on pineapples purchased there. He gave the names, the time and places where he heard these persons make statements to him that he did not owe such taxes. Furthermore, he testified that he had never been informed or heard anyone mention that such taxes were exempt *only* to persons living without the United States. The defendant further tes-

tified that he never at any time inquired about his owing taxes on his pineapple earnings; that he did not consult an accountant, a lawyer, or anyone else as to whether he owed taxes on his income from pineapples purchased in Mexico, until the investigation was commenced in the year 1946 by government agents. At that time one of the government agents informed him that he was of opinion he owed taxes on profits made from the pineapple transactions and advised him to seek the advice of a lawyer or an accountant. The defendant thereupon employed an accountant to make up for him a statement of what he owed in the way of taxes and later, in company with his accountant, he interviewed a government agent and told him that he wanted to correct some testimony previously given. He then stated that Markusfeld had an interest in the profits derived from the importation of the pineapples; that Markusfeld was a sick man at the time he first talked to the agent; that he did not want to bother Markusfeld or have the agents bother him; and that he stated that Markusfeld had no interest in the income and that the defendant was willing to have it added to his account. During the interim between the defendant's two conversations with the agent, Markusfeld had died. When the defendant's attention was called to the two checks in the sum of $7,855.45 and $7,144.55 and which totaled $15,000.00, and both had been deposited to the Markusfeld account on the same day and that they had cleared through the Laredo Bank on the same day and he was asked why the total amount was broken down in that manner, he stated, "To make it look good," or 'To make it look

better." The agent charged the defendant with this total of $94,999.70.

It becomes patent, from a careful reading of the record, that the defendant was reluctant and seemed unwilling to testify frankly and without evasion. A cursory reading of the record will readily disclose that government counsel were compelled to use continuous pressure to obtain from the defendant evidence approaching a frank and full statement of his business dealings. One may gain from his answers while testifying as a witness that he was not only evasive, but alert to carry an open disclosure of his business. Furthermore, he gave to the government investigators no information as to his business affairs save and except what they asked for, and then it was found in many instances the information which he gave was inaccurate and misleading. His money was deposited in several banks, as to which he gave no information. His substantial earnings from his pineapple business he did not even enter on his books. He left to the investigators the laborious task of searching out and finding where his funds were located and nearly all the facts upon which they could base an accurate return. In their investigation, they found that the defendant had purchased valuable property in San Antonio, Texas and when called upon to explain how much was expended for such property and its value he advised the investigators that the broker Isla, a wealthy citizen of Mexico, owned an interest in this property, or that it stood as security for money he owed this fruit broker. However, the title to the property was in the defendant.

After the return of the indictment against the defendant, and after he had employed an accountant, and after he had been advised that he owed taxes on his pineapple income, the *bona fides* of his failure to pay these taxes created a question for the jury. He had made thousands of dollars from the pineapple business; he had not paid taxes on the money derived from this source and his only defense is that he had been advised by many persons in Mexico that he did not have to pay such taxes. He had entered into a contract with a Mexican citizen by the name of Isla and he testified that he owed Isla a large amount by way of brokerage fees. He never attempted to show that he was a citizen of Mexico, and the contract he had entered into for the purchase of pineapples in Mexico lifts above any fog of doubt that they were to be sold in the United States:

> "Tenth: As the pineapple contracted by the COMPANY is dedicated solely and exclusively for sale as fresh fruit in the U. S. A., it is understood that under no condition will it be permitted to be sold, all or in part, in the Republic of Mexico."

This contract informed the defendant since he was no citizen of Mexico that his earnings became an integral part of his income.

There was no error in refusing to give the requested charge of the defendant for a directed verdict in his behalf. There is no dispute that the defendant and his wife withheld substantial funds owing to the Government by way of income tax, and it was for the jury to say whether the defendant's conduct consti-

tuted a wilful attempt to defeat and evade income taxes. *Stilson vs. United States*, 250 U. S. 583; *Gurinsky vs. United States*, 259 F. 378; *U. S. vs. Skidmore*, 123 F. (2d) 604, certiorari denied 62 S. Ct. 626, 315 U. S. 800, 86 L. Ed. 1201; *cf Spies vs. United States*, 317 U. S. 492.

Immediately after the defendant was indicted and before his trial, he mailed to the Government his check in the sum of $260,106.15. The Government did not introduce the check, but did prove, without objection, that the remittance had been received. The defendant then introduced a copy of the check. The defendant next offered in evidence a letter that accompanied the check and which, except for the letterhead and signature, is as follows:

"October 15, 1948

Collector of Internal Revenue
Austin, Texas
Sir:

I am attaching hereto the following:

(1) Copy of the indictment returned by the Federal Grand Jury in the District Court of the United States for the Western District of Texas, San Antonio Division, on October 5, 1948.

(2) Analysis of the income and victory taxes alleged to be owed to the United States of America under said indictment and interest at 6% on said deficiency in taxes computed to October 19, 1948.

(3) My check in the sum of $260,106.15 to cover said alleged deficiency in taxes and interest to October 19, 1948.

The income tax alleged to be due under the

'First Count' for the year 1942 has not been included in the attached check, because such tax was forgiven by Section 6 of the Current Payment Act of 1943.

This indictment is the first notice I have had that I owed Taxes in the amounts therein enumerated and I am, therefore, glad to pay the amount alleged to be due.

When my income tax returns for the years 1942, 1943 and 1944 were prepared and filed, I did not include as part of the taxable income certain commissions I earned on transactions in Mexico because I honestly and in good faith believed they were not taxable in the United States and I was so advised in Mexico. Subsequently I ascertained that I was wrong and should have paid taxes on such income. I would have paid such taxes before had the Government notified me of the amount.

I repudiate any allegation that my income tax returns were false or fraudulent and further state that I did not intend, wilfully or otherwise, to defeat or evade in any manner any part of the income taxes due to the United States."

The Government objected to the letter being admitted in evidence on the basis that it was self-serving. The defendant contended that by going into the transaction, the Government had "opened the door" and that defendant was entitled to have the letter that accompanied the remittance admitted in evidence. The Government's objection was sustained and the letter was excluded.

This is not a case where part of a conversation or document has been introduced by one party, and the other party is then entitled to introduce all of the conversation or document. The Government had

merely proved as a fact that the remittance had been received, which went to show that at the time of the indictment the defendant owed at least that amount in unpaid income taxes. It may be observed that later in the trial it appeared that that fact was without dispute. The letter could be admissible only upon the theory that it is a part of the *res gestae* of the remittance.

> "Res gestae must spring from the main fact; it presupposes a main fact and it means the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. * * *" *Yarbrough vs. Prudential Ins. Co. of America*, 99 F. (2d) 874, 876.

The main fact "may, however, be either the ultimate fact to be proved or some fact evidentiary of that fact." 32 C. J. S., Evidence, Sec. 405. Here the main fact was the remittance as evidence of the fact that the defendant owed at least that amount in unpaid income taxes. The letter did not deny that the amount of the remittance was justly owed. It was not necessary to explain the remittance. Its statements related rather to past acts and occurrences. It was carefully prepared and deliberately self-serving. There was no spontaneity nor impulsiveness about the letter. See *Halleck vs. Hartford Acc. & Indem. Co.*, 75 F. (2d) 800. We conclude that it was not admissible in evidence as a part of the *res gestae* of the remittance. 32 C. J. S., Evidence, Secs. 416 and 417. *Yarbrough vs. Prudential Ins. Co.*, 99 F. (2d) 874, rehearing denied, 100 F. (2d) 547.

Furthermore, the defendant was not injured by the exclusion of this letter, because the trial court permitted him to testify to the same facts as contained therein.

Wilfulness was of course an essential element of the case to be proved, and the defendant insists that the evidence to prove wilfulness was circumstantial and that the court erred in refusing to instruct the jury on the law of circumstantial evidence. In nearly all cases intent must be inferred from the facts and circumstances of the case. The trial court charged the jury fully and carefully that honest mistake or good faith belief on the part of the defendant were complete defenses. He further charged the jury in effect that unless they disbelieved these defenses beyond a reasonable doubt and were satisfied beyond a reasonable doubt that the defendant wilfully and knowingly attempted to defeat and evade his income taxes, that they should find him not guilty. Other than included in these defenses of honest mistake and good faith belief, there was no hypothesis which the jury might reasonably have considered to explain the evidence on a basis of innocence rather than on a basis of guilt. The jury's verdict concludes the question that neither of these defenses was reasonable in the minds of the jurors. We cannot conceive how the jury could have disbelieved these defenses beyond a reasonable doubt and could still have believed that a reasonable hypothesis of innocence existed or that the proof was consistent with innocence. The court carefully and patiently charged the jury in language which the trial judge thought would be most helpful to the jury and which pro-

tected every substantial right of the defendant. The defendant was not entitled to have the court charge the jury in language selected by the defendant rather than by the court. See *Onderdonk vs. U. S.*, 16 F. (2d) 116.

Moreover, the record is replete with contradictory statements in the defendant's answers which were in no wise circumstantial. The conduct of the defendant, his seeming unwillingness to answer fully the questions propounded to him and his attempt to explain all the discrepancies by placing the responsibility for them on his bookkeeper, justify the jury's finding as to fraud. It is well established that where both direct and circumstantial evidence supports a conviction, failure to give a circumstantial evidence charge does not constitute reversible error. See *Bedell vs. U. S.*, 78 F. (2d) 358; *Portman vs. U. S.*, 34 F. (2d) 406.

The appellant urges that the trial court erred in permitting the Government to introduce evidence that Benny Markusfeld, the appellant's brother-in-law, failed to include the approximate $95,000.00, which has been heretofore referred to as having been paid by the appellant to Markusfeld in his (Markusfeld's) income tax return. As we have heretofore pointed out, the defendant had first claimed that Markusfeld had no interest in the pineapple earnings, and had later, after Markusfeld's death, reversed that position. The defendant himself had brought out in the evidence that the Government was charging this sum of $95,000.00 as income to Markusfeld's estate for the year 1943 and was attempting to collect that sum from the Markusfeld estate.

In rebuttal of that evidence, and as an inference that the possession of this $95,000.00 was not in his (Markusfeld's) own right but was actually in aid of the defendant's attempt to evade his own income taxes, we think that it was competent for the Government to prove that Markusfeld had not reported this $95,000.00 as income.

The appellant strenuously urges that the trial court deprived him of his privilege against self-incrimination as guaranteed by the Fifth amendment to the Constitution of the United States in that the trial court refused to admit the testimony of the witness Dan Dreeben to the effect that the defendant had stated to him that his pineapple income was not taxable until after the defendant took the witness stand and testified to his good faith belief that such income was not taxable. The appellant insists that that action of the court compelled the defendant to take the witness stand involuntarily and under compulsion. At the time the court made the statement that Dan Dreeben's testimony would be admitted after the defendant had taken the witness stand, the defendant's counsel had already informed the court that the defendant expected to testify as a witness. At no time during the trial was the court advised that his ruling with respect to Dreeben's testimony was going to force the defendant to take the witness stand. We conclude from the evidence that as a matter of fact the defendant took the witness stand voluntarily, in accordance with his intention previously announced by counsel, and not because of the ruling of the court with respect to the testimony of Dan Dreeben. Whether the court prop-

erly declined to admit that testimony when Dan Dreeben was first offered as a witness it is not necessary for us to decide.

The charge of the trial court, viewed fully and fairly in its entirety, carefully protected defendant's every constitutional right, and substantially preserved for the consideration of the jury every important and material issue in the case. Furthermore, a careful reading and study of this voluminous record leads to the conclusion that the court exercised a patience and care throughout the trial which gave to the defendant every opportunity to show, if he could, that he was innocent, and the record looms above impatience and prejudice. Manifestly, a jury issue was presented, and the conviction and sentence must therefore be sustained.

We consider it unnecessary to pass upon the other specifications of error urged, as a careful consideration of each of them impels the conclusion that they are, without exception, wholly without substance or merit.

We find no reversible error in the record and the judgment is accordingly

AFFIRMED.

RUSSELL, Circuit Judge, concurring specially:

I concur in the judgment of affirmance. However, I am of the opinion that the ruling of the Court that the letter, which accompanied the remittance in payment of the amount of taxes which the indictment alleged the defendant had failed to pay, was inadmissible was erroneous. Nevertheless, under the

circumstances of this case, and especially because the defendant was permitted to testify to substantially the same facts as were stated in the letter which was rejected, I do not find that the error prejudiced the defendant.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 13142

JOSEPH JACOB BARSHOP,
Appellant,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Texas

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(November 23, 1951.)

(ON MOTION FOR REHEARING)

Before McCORD, RUSSELL, and RIVES, Circuit Judges.

McCORD, Circuit Judge: We have carefully considered appellant's motion for rehearing and motion for permission to reargue the case. The two counsel for appellant who appeared before our court to argue this case were given 55 minutes in which to be heard. We are of opinion, in view of the fact that counsel

were permitted to argue for almost the maximum time allowed under the rules in support of the appeal, that the motion for oral reargument should be and the same is hereby overruled and denied.

On the merits of the case we have re-examined the entire record and voluminous briefs heretofore filed in the light of the various specifications of error now urged, and further review fails to disclose any error which prejudiced the substantial rights of appellant.

Rule 52(a), Federal Rules of Criminal Procedure, provides that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." *Cf. Kotteakos vs. U. S.*, 328 U. S. 750. We think the errors urged by appellant, if any, come clearly within the orbit of this rule.

Counsel for appellant contends that the ruling of the trial court with respect to the testimony of the witness Dan Dreeben required the appellant to take the witness stand in violation of his constitutional right against self-incrimination. This argument is without merit. Moreover, it is without support in the record. At the trial no intimation was ever given the court by way of objection or exception that such ruling was in prejudice of defendant's constitutional rights and that it would force him to take the witness stand involuntarily, and we may fairly assume that neither appellant's counsel nor the trial judge understood at the time that it would have such effect. The record further reveals not only that appellant's counsel had already advised the court at the time of such ruling that the defendant would take the witness stand, but also that Dreeben was later

permitted to testify as desired. Furthermore, no error in this regard was even suggested until the taking of this appeal. Under such circumstances, the ruling complained of did not constitute reversible error. See *Molina vs. United States*, 162 F. 2d 198; *United States vs. Mascuch*, 111 F. 2d 602; *Hoskins vs. United States*, 4 F. 2d 804; *Miller vs. United States*, 287 F. 864.

With reference to the further error alleged in excluding the letter accompanying the check, the case of *Crawford vs. United States*, 212 U. S. 183, 201, is readily distinguishable under its own facts, and is not controlling upon us here. There the exculpatory letter was written immediately after the charge was made and long before the trial. Here, the check for back income taxes in the amount of $260,106.15 was not mailed to the Collector until eleven days after the indictment was returned, in spite of the fact that the defendant had been informed by his accountants long beforehand that he owed a large amount in unpaid income taxes. At the same time the self-serving letter was physically attached to the check in an obvious effort to secure its admission into evidence.

However, let us concede for the sake of argument that the exclusion of the self-serving letter accompanying the remittance was erroneous, and that the letter should also have been admitted. Such error, if any, was subsequently cured when the appellant was permitted to take the stand and testify over and over again not only as to everything the letter contained, but much more.[1]

[1] Appellant testified that the indictment was the first notice he had of the amount of taxes owed:

Q. "When you went to see Mr. Carneiro, did you make any

This court, in considering a somewhat similar situation in the recent case of *Burton vs. United States*, 175 F. 2d 960, 965-966, rehearing denied, 176 F. 2d 865, certiorari denied 338 U. S. 909, has ruled:

> "Astorias fully testified in this trial that he was thus put in fear about his income taxes and

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statement to Mr. Carneiro about whether you had or had not reported your pineapple account?

A. "I told him that I had not reported it.

Q. "Did you tell him why?

A. "Yes, sir.

Q. "And what did Mr. Carneiro tell you?

A. "Well, he studied for awhile there, but told me that he thought that I had made a mistake in not reporting it, and I would probably have an explanation to make. * * *

Q. "Then, did you make any effort to settle with the Government, if you owed the Government any money?

A. "I told Mr. Grossnickle to get that thing straightened out if he could.

Q. "Did you undertake to get the Government, or a Government Agent to tell you how much they claimed you owed?

A. "I asked Mr. Grossnickle to get together with him, and for them to give me my tax bill.

Q. "Were you ever able to find out anything about how much the Government claims you owed, until you saw the figures set forth in the indictment?

A. "No, sir. They never told me how much I owed."

Appellant further testified that he in good faith believed that his Mexican pineapple income was not taxable:

Q. "Had you prior to 1942, heard any discussion about whether or not such income as you understood this pineapple income to be was reportable or taxable?

A. "Well, in my business trips to Mexico, I heard from various sources there that earned income made from a foreign source is not reportable or taxable. * * *

Q. "When Mr. Grossnickle came to your office, in January 1946, to check your income tax return, did you have any conversation with him about that subject? * * *

A. "Well, I told him that that special account was a place that I took all of my surplus money from all of my other businesses and put the pineapple money in at the end of the pineapple season."

Q. "All right. And what did Mr. Grossnickle say to you in substance, as you remember?

A. "He asked me why I did not report that pineapple money.

Q. "And what did you tell him, if anything?

A. "That I was not supposed to report it. * * *

Q. "And what did he say to you?

A. "Well, he told me that I was wrong, and I had better get advised properly. * * *

* * * *

got him a lawyer and on the lawyer's advice and in his company he went to the district attorney and told all he knew, and was allowed to pay his income tax deficiency with penalties. There

Q. "* * * Now, have you at any time had any purpose, desire, or intention of defrauding the Government out of any of its tax money?

A. "No, sir.

Q. "Have you acted in this matter in good faith from the beginning to the end?

A. "Yes, sir. * * *

Q. "Now, the money that you have made, have you attempted in any way to hide it out, where the Government could not find it or people would not know that you had it?

A. "No, sir. * * *

Q. "Have you had any place to put your money other than to deposit it in the bank or banks, as people do in the normal course of business?

A. "That is what I did. * * *

Q. "All right. Now, have you at any time kept two sets of books, and by two sets of books, I mean one set to show the Government, and one set for you to see, or have you just had one record of accounts with respect to each of your businesses?

A. "One set.

Q. "Have you at any time undertaken to dispose of any records or put any records out of the reach of the United States Government, or its agents or officers?

A. "No, sir."

Appellant further testified:

Q. "Did you pay income taxes in a substantial amount to the Government during the years of 1942, 1943, 1944, 1945, 1946, 1947 and 1948?

A. "Yes, sir, I paid, I would say, over a half million dollars.

Q. "Have you tried every time to pay the Government what you thought the Government was due, or what was due the Government?

A. "I always paid what I thought was due the Government.

Q. "Have you ever at any time by any act sought to cheat or to defraud the United States out of any part of its taxes?

A. "No, sir. I paid the Government everything I owed them every year.

Q. "Did you ask these gentlemen, when they told you that you were wrong, to calculate and find out what you owed the Government, and that you wanted to pay it—I mean the Agents that were investigating your return.

A. "Mr. Carneiro and myself.

Q. "Did you tell them that?

A. "Sir?

Q. "Did you tell them to calculate what you owed, and you wanted to pay it?

A. "Yes.

Q. "In those words, or words to that effect?

A. "Mr. Carneiro and I both tried to get them to tell us what I owed them."

was thus already in evidence without contradiction all that these lengthy documents (Grand Jury records and prior statement) would tend to show on this line. If there was error in excluding pertinent parts of them offered for this not clearly expressed purpose, we do not think it is reversible error." Cf. *Dean vs. U. S.*, 246 Fed. 568, 575; *Garanflo vs. U. S.*, 246 Fed. 910, 912-914; cf. also *Hair vs. U. S.*, 240 Fed. 333, 337; see also 3 Am. Jur., Appeal & Error p. 585, Sec. 1030 et seq.; 5 C. J. S., Appeal & Error, p. 1057, Sec. 1749 et seq.; cf. *York vs. U. S.*, 241 Fed. 656, 658.

It therefore becomes patent that if error was committed by the court in excluding the letter accompanying the check it was error without injury, for the same proof was offered and admitted repeatedly throughout the record in defendant's own testimony and that of his witnesses. The record is replete with defendant's statements as to his good faith elicited from him through his counsel by means of improper and leading questions, to which no objection was interposed by the Government. Under such circumstances, when the evidence is so overwhelming as to appellant's guilt, it is not our province to reverse the conviction merely because the jury did not believe appellant's testimony that he never knew until after he was indicted that he owed the Government over a quarter of a million dollars. The jury listened to every phase of the evidence, heard the defendant's every explanation and listened to a charge that was not only full and fair but emphasized repeatedly that he must go free unless they believed him guilty beyond all reasonable doubt. Thereafter they brought

in a verdict of guilty as charged in all five counts of the indictment. We are unable to find any reversible error in this case, and the application for rehearing is therefore

DENIED.

RUSSELL, Circuit Judge,

Adheres to the views heretofore expressed in his concurrence in the judgment of affirmance and concurs in the order denying the petition for rehearing.

RIVES, Circuit Judge, dissenting:

The appellant was not warned by the Internal Revenue Agent Grossnickle as to his rights, and objection was made to the introduction in evidence of any statement made or record supplied by appellant to Grossnickle. Not only were the appellant's responses to Grossnickle received in evidence against him, but even his failure to volunteer information was considered as a circumstance of his guilt as is evident from the following expressions in the fourth paragraph of our original opinion:

> "When the investigation began no information was given by the defendant touching his pineapple business. Moreover, the tax investigators were not informed of the different banks in which the defendant did business and kept

> accounts. It became necessary for the investigators for the Government to search out and ascertain the true facts touching nearly every phase of the defendant's business."

Under the Fifth Amendment it is not permissible to compel any person in any criminal case to be a witness against himself. Yet the law requires every taxpayer to make and file income tax returns and to permit his records of income to be examined by government agents, and such required evidence is admissible against the taxpayer in a criminal case. The ground upon which that result is justified is that by failing to claim his constitutional privilege when the information is required of him, the defendant has waived that privilege.[1] In this case the evidence does not show that any such waiver of the defendant's constitutional privilege was intentionally made, nor that either the express admissions to Grossnickle or those arising from the defendant's silence were in fact voluntary.[2]

Further consideration has convinced me also that the refusal to admit in evidence for the jury's consideration the letter copied in the opinion that accompanied the check to the Government in the sum of $260,106.15 was not merely error but was highly prejudicial. Our holding that the letter was not admissible in evidence as a part of the *res gestae* of the remittance was based upon a false premise that the remittance went only to prove that the defendant owed at least that amount in unpaid income taxes. In the trial, that fact never was actually in dispute.

[1] Shushan vs. U. S., 117 F. 2d 110, 117; Nicola vs. U. S., 72 F. 2d 780, 784; Stillman vs. U. S., 177 F. 2d 607, 617.

[2] See U. S. vs. Heitner, 149 F. 2d 105, 107.

The defense urged was good faith, that the defendant's conduct was not a *wilful* attempt to defeat and evade income taxes. The unexplained remittance made only eleven days after the return of the indictment carried with it the strong inference that the defendant knew that he owed the income taxes but did not see fit to make the payment until the indictment was returned. The letter undertook to explain why the remittance was made at that time and was relevant to be considered upon the question of the defendant's good faith in not having made the payment earlier. The importance of the letter as evidence related not to the uncontested issue of indebtedness, but rather to the vital issue of good faith. Upon that issue, the remittance having been proved, I think that the letter accompanying the check was admissible either as a part of the *res gestae* of the remittance, or more properly by reason of that broad rule of fair play that when a part of a conversation, document or transaction has been introduced in evidence by one party, the opposing party has a right to introduce the remainder, so that the jury may consider the entire conversation, document or transaction. Under that rule, the fact that the letter was self-serving did not render it inadmissible.[3]

The government considered the defendant's remittance of over a quarter of a million dollars delinquent income taxes made just after the return of the indictment as a virtual admission of guilt and at the very outset of the trial proved that remittance by

[3] Perrin vs. U. S., 169 Fed. 17, 24, 26; York et al. vs. U. S., 241 Fed. 656; 22 C. J. S., Criminal Law, Sec. 660, p. 1043; 20 Am. Jur. Evidence, Sec. 551, p. 464; see also note following Commonwealth of Mass. vs. Britland, 15 N. E. 2d 657, 118 A. L. R. 132, 138.

the first witness, thus striking a well nigh fatal first blow against the defendant. It was not until the seventh day of the trial that the court permitted the defendant to testify that the indictment was the first notice he had of the amount of taxes owed, and that he would have paid such taxes before had the government notified him of the amount. He never was permitted to testify that he wrote and mailed the explanatory letter along with the remittance. When considered by the jury in the light of the defendant's interest in the verdict, his testimony may have been disbelieved, while the jury may have given weight to the statement accompanying the remittance. Considering the letter and the remittance together as parts of one entire transaction the jury may well have rejected any inference of the defendant's bad faith in not having paid the taxes earlier. Failure to reject that inference originally may not have been cured by testimony of the defendant in rebuttal of the inference. It would be just as logical it seems to me to argue that error in admitting an illegal confession was rendered harmless by permitting the defendant to testify in denial of the statements contained in the confession.

Every claim that an error was harmless must be decided according to the circumstances of the particular case, and precedents are rarely if ever controlling. However, the situation considered in *Crawford vs. United States*, 212 U. S. 183, 201, is remarkably similar to this case:

> "* * * The defendant did on the trial testify to the same explanation as contained in the letter of his counsel, i. e., that Aspinwall in

substance consented to the taking of the letters, but it is doubtful if such evidence cured the error of excluding the letter written at once after the accusation was made and long before the trial, in which letter he admitted and explained the taking, showing it was from no desire to suppress evidence, but, on the contrary, to preserve it."

In holding an error harmless, the Court should be careful not to substitute its judgment for that of a jury, and thus in effect to deny the defendant's right to trial by jury. I cannot with fair assurance say that if the jury had been allowed to consider the letter it might not have reached a different verdict.[4]

The holding in this case is important also because of its probable effect upon the collection of revenue by the government. Taxpayers may be slow to remit delinquent taxes when the fact of such remittance may be used in evidence against them, while their explanation of the delinquency made at the time of remittance is excluded from evidence.

I think that the case should be reversed and remanded for another trial, and therefore respectfully dissent.

---

[4] Kotteakos vs. United States, 328 U. S. 750, 763; Fiswick vs. United States, 329 U. S. 211, 218; Krulewitch vs. United States, 336 U. S. 440, 444; see Federal Rules of Criminal Procedure, Rule 52(a).

STATUTES INVOLVED

Title 26, Section 51(a), U.S.C., 1946, as amended, 62 Stat. 114, 115:

"Every individual having for the taxable year a gross income of $600 or more shall make a return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury. Such return shall set forth in such cases, and to such extent, and in such detail, as the Commissioner with the approval of the Secretary may by regulations prescribe, the items of gross income and the deductions and credits allowed under this chapter and such other information for the purpose of carrying out the provisions of this chapter as may be prescribed by such regulations."

Title 26 Section 54(a), U.S.C., 1946:

"Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe."

Title 26, Section 54(b), U.S.C., 1946:

"Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return, render under oath such statements, or keep such records, as the Commissioner deems sufficient to show whether or not such person is liable to tax under this chapter."

Title 26, Section 57, U.S.C., 1946:

"As soon as practical after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax."

Title 26, Section 3614(a), U.S.C., 1946:

"The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

Title 26, Section 3615(a), U.S.C., 1946:

"It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in

which his district lies; and when the person intended to be summoned does not reside and cannot be found within such State or Territory, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned."

Title 26, Section 3615(b)(4). U.S.C., 1946:

"Such summons may be issued—"

"Whenever any person who is required to deliver a monthly or other return of objects subject to tax refuses to allow any regularly authorized Government officer to examine his books."

Title 26, Section 3616(b), U.S.C., 1946:

"Whenever any person—"

"Being duly summoned to appear to testify, or to appear and produce books as required under Section 3615, neglects to appear or to produce said books—he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Title 26, Section 3632, U.S.C., 1946:

(a)(1) "Every collector, deputy collector, internal revenue agent, and internal revenue officer assigned to duty under an internal revenue agent, is authorized to administer oaths and to take evidence touching any part of the administration of the internal

revenue laws with which he is charged, or where such oaths and evidence are authorized by law or regulation authorized by law to be taken."

(2) "Every collector of internal revenue and every superintendent of exports and drawbacks is authorized to administer such oaths and to certify to such papers as may be necessary under any regulation prescribed under the authority of the internal revenue laws."

(b) "Any oath or affirmation required or authorized by any internal revenue law or by any regulations made under authority thereof may be administered by any person authorized to administer oaths for general purposes by the law of the United States, or of any State, Territory, or possession of the United States, or of the District of Columbia, wherein such oath or affirmation is administered, or by any consular officer of the United States. This subsection shall not be construed as an exclusive enumeration of the persons who may administer such oaths or affirmations."

Title 26, Section 3633(a), U.S.C., 1946:

"If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

Title 26, Section 145(a), U.S.C., 1946:

"Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

Title 26, Section 145(b), U.S.C., 1946:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 482

JOSEPH JACOB BARSHOP, PETITIONER

v.

UNITED STATES OF AMERICA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The original opinion of the Court of Appeals (R. 1220-1236) is reported in 191 F. 2d 286, and the court's opinion on petitioner's motion for rehearing (R. 1275-1285) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction of petitioner was entered on August 22, 1951. (R. 1237.) A motion for rehearing was denied November 23, 1951. (R. 1286.) The petition for a writ of certiorari was filed on December 19, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether evidence admitted as part of the Government's case was obtained from the petitioner in violation of the Fourth or Fifth Amendments.

2. Whether the exclusion of the testimony of petitioner's witness Dreeben until after petitioner had testified operated to deprive petitioner of his privilege against self-incrimination.

3. Whether it was error for the trial court to exclude petitioner's self-serving letter sent to the Collector of Internal Revenue after indictment, when the fact of the payment of the alleged tax deficiencies and interest, transmitted with the letter, was admitted.

4. Whether the trial court correctly instructed the jury.

5. Whether the trial court properly admitted rebuttal evidence that the income tax returns of petitioner's brother-in-law did not report as income moneys which he received from the petitioner.

STATUTE INVOLVED

INTERNAL REVENUE CODE:

> SEC. 145 [as amended by Section 5(c), Current Tax Payment Act of 1943, c. 120, 57 Stat. 126]. PENALTIES.
>
> (a) FAILURE TO FILE RETURNS, SUBMIT INFORMATION OR PAY TAX.—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or

declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who wilfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

Petitioner was indicted on October 4, 1948, on five counts alleging violations of Section 145(b) of

the Internal Revenue Code. (R. 2-6.) Counts 1, 2, and 3 charge that he wilfully attempted to evade and defeat a large part of his income taxes by filing false and fraudulent income tax returns for the years 1942, 1943, and 1944. (R. 3-5.) Counts 4 and 5 charge that he wilfully attempted to evade and defeat the income taxes of his wife by filing and causing to be filed for her false and fraudulent returns for the years 1943 and 1944. (R. 5-6.) After a trial to a jury, petitioner was found guilty on all five counts. (R. 1138.) Motions for judgment of acquittal and in the alternative for a new trial (R. 1138-1162) were overruled. (R. 1167.) Fines of $5,000 were imposed on each of the five counts and a sentence of three years imprisonment was imposed on the first four counts. (R. 1167-1168.) An additional two year sentence was imposed on the fifth count but it was suspended and the petitioner was granted five years probation to begin at the expiration of the three year sentence. (R. 1168.) This judgment was affirmed by the Court of Appeals for the Fifth Circuit (R. 1237), and a motion for a rehearing was denied (R. 1286).

The Government established that petitioner, a wholesale and retail produce dealer, residing in San Antonio, Texas, and his wife, filed separate returns on a community property basis. (R. 31-62.)

Petitioner's reported sources of income were the Banana Distributing Company, Fruit Distributing

Company, and a beer business (which three businesses he owned individually), and a partnership known as the Mexican Banana Company. (Ex. 1, 2, 3, R. 31-55.) In addition, petitioner had an individually owned business of importing pineapples from Mexico. (R. 104.) The pineapple importing business was conducted under a contract which provided that the fruit supplied by the Mexican supplier to petitioner's Banana Distributing Company was to be sold exclusively in the United States. (R. 272-273.) The returns were prepared at the request of the petitioner by H. G. Earnest, accountant and bookkeeper employed by appellant (R. 92) on a part time basis during 1942 and the early part of 1943, and on a full time basis during the latter part of 1943 (R. 86-87). In preparing the returns, Earnest relied upon information furnished by petitioner and the records of the companies in which the petitioner was interested. Earnest was not advised that petitioner had any other income. (R. 87-102.)

After the investigation of his tax returns commenced, petitioner employed a certified public accountant who prepared net worth statements. (R. 139.) These disclosed corrected net income in the amounts recited in the indictment. (R. 144-152.) The unreported income thus reflected was $126,011.90 for 1942, $122,294.65 in 1943, and $113,393.08 in 1944. (R. 150-151.) Based on these figures, taxes would be due and owing by petitioner and his

wife for the indictment years in the exact amounts alleged. (R. 297.) Petitioner's income based on the profit and loss method exceeded that alleged in the indictment. (R. 262, 264 and 266.) Immediately upon the return of the indictment, petitioner made a payment of $260,106.15 to the Collector of Internal Revenue. (R. 63.) On cross-examination of the Government's witness, Deputy Collector Struhall, in charge of the pertinent tax returns, who had testified as to the receipt of this additional amount (R. 19-20), it was brought out that a letter from petitioner had accompanied his check for this payment (R. 71). A photostat of the check for $260,106.15 was introduced by petitioner's counsel, whereupon he offered the petitioner's letter of October 15, 1948 to the Collector of Internal Revenue, Austin, Texas, by which the additional payment after indictment was sent. (R. 71-72.) The letter was excluded on the Government's objection that it was self-serving. (R. 72-73.) In substance, the letter indicated that the enclosed check was to cover the tax deficiencies recited in the indictment after taking credit for the "forgiveness" provisions of the Current Tax Payment Act of 1943 as to 1942 taxes, that certain "commissions" earned in Mexico had been omitted from the pertinent returns for 1942, 1943, and 1944, in the mistaken belief it was not taxable, and that petitioner had no intent to evade payment of income taxes due the United States. (Ex. 2, R. 73-74.)

It was admitted at the trial that petitioner had failed to report or pay tax on substantial income from his pineapple importing business. (R. 804.) This income amounted to over $400,000. (R. 262-266.) Other adjustments made by the Revenue Agent amounted to $192,974.35. (R. 431.) Petitioner entered a $30,000 check, dated April 27, 1943 (Ex. 12, R. 130), on the records of Banana Distributing Company as "J.B. Exchange to buy pines in Mexico" (R. 123-124). This item was in fact a loan (R. 130) and falsely reduced taxable income in that amount (R. 210). A similar entry of a $20,000 check of April 6, 1943 (Ex. 13, R. 110, 130-131), entered as a pineapple purchase on the Banana Distributing Company check stub constituted a transfer of funds between banks and resulted in a false expense deduction. (R. 210, 498-500.) Another $10,000 check, dated November 18, 1943 (Ex. 14, R. 131-132), which was in fact a loan, was entered as a purchase. (R. 208-209, 465.) No checks actually issued in payment of pineapples were in round figures. (R. 198-207, 561-570.) Two checks, one for an investment in onions, in the amount of $9,779.21 (Ex. 20, R. 471), and the other for $685.25 were both entered as purchases from Mexican Banana Company when only the latter was a true entry. (Ex. 21, 472). There was no correcting entry in the Banana Distributing Company books when petitioner received the return of his investment. (Ex. 22, R. 553.) Instead, a deposit was made in petitioner's account at the

Laredo National Bank, at Laredo, Texas. (R. 379.) Petitioner did not record the receipt of profit from the onion investment transaction in his 1944 return. (Ex. 3.)

Payments totalling $94,999.70 were made to petitioner's brother-in-law, Benny Markusfeld. These amounts apparently were treated as payments for services rendered by Markusfeld and were not included by Markusfeld as income (R. 289, 293) but petitioner variously explained that Markusfeld had not imported pineapples; that he drew the money to pay Mr. Isla; that it did not belong to Markusfeld; that it might be money petitioner owed Isla and that it represented Markusfeld's interests in profits from pineapple imports, but, as Markusfeld was sick, petitioner did not want the agents to bother him and that he had therefore stated Markusfeld had no interest in the income and petitioner was willing to add it to his own. Two simultaneous checks included in these payments in 1942, totalling $15,000 were explained by petitioner to the agents as being in odd figures "to make it look good" or "to make it look better". (R. 288-294.) Petitioner acknowledged, on cross-examination, that Markusfeld had not reported these moneys totalling about $95,000 in 1943 and 1944, in his, Markusfeld's, returns for those years. (R. 898-903.)

It was established that petitioner kept no records on his pineapple importing business (R. 266) although petitioner later explained that bank state-

ments and check stubs had been sent to Mexico (R. 267, 935-936). Petitioner did not disclose two bank accounts of his own and one of his wife's when initially questioned by the examining agents. (R. 236-237.) The existence of these accounts was divulged only after petitioner employed a certified public accountant as his representative. (R. 241.) Finally, in each of the returns involved in the indictment, the taxpayer answered "No" to the question "Did you receive during your taxable year any amount claimed to be non-taxable?" (R. 31-62.) His reason for so answering was that this was what he understood to be correct at the time. Later he blamed his bookkeeper. (R. 937-938.)

Petitioner did not contest the existence of unreported income but sought to explain the omission of pineapple income as being the result of the petitioner's understanding from conversations in the latter part of 1942, or early 1943, with a Mr. Barron and others in Mexico, that income earned in Mexico was not subject to taxation. (R. 630-631, 805-806.)

One of the petitioner's witnesses, Dan Dreeben, was asked if he had had a conversation with petitioner sometime in 1942 or 1943, relative to the taxability of income from a pineapple deal petitioner had in Mexico. On objection by the Government, Dreeben was precluded from relating this conversation. (R. 699.) However, following conclusion of petitioner's own testimony, Dreeben was recalled and permitted to testify that petitioner,

some five, six or seven years previous, had discussed this pineapple business and stated "one of the best things about it is that the income is not taxable." (R. 963.)

ARGUMENT

By way of preface it should be noted that petitioner does not contest the sufficiency of the evidence to sustain his conviction. His objections to the holding of the Court of Appeals concern the propriety of the admission and exclusion of evidence by the trial court and the failure of the trial court to give petitioner's requested instructions on the circumstantial evidence.

1. Petitioner's first three specifications of error (Pet. 7-8), which do not appear to have been raised at the trial or in his original procedings in the Court of Appeals, can conveniently be considered as raising one objection. It is contended that the admissions of petitioner to the investigating agents, their testimony as to his failure to disclose certain facts, and evidence of the contents of his records produced for the agents' examination, were involuntarily elicited from petitioner and were inadmissible because the Government agents were empowered by statute so to elicit information to determine the correctness of tax returns. Petitioner contends that if he had declined to furnish the requested information, he would have been subject to prosecution under Section 145(a) of the Internal

Revenue Code, *supra*, pp. 2-3, which makes it a misdemeanor wilfully to fail to supply records or information required to be kept for income tax purposes. It is claimed the use of the damaging admissions and records offends the guarantee of the Fifth Amendment of the Constitution against compulsory self-incrimination, and that records so used must be considered to have been unlawfully seized in violation of the Fourth Amendment.

The answer to this contention is that petitioner does not even claim that he asserted the privilege against self-incrimination in response to the agents' questions or to their demands for his records. This failure to invoke the privilege at the time the information was demanded constituted a waiver. *Rogers* v. *United States*, 340 U.S. 367, 370-371; *United States* v. *Monia*, 317 U.S. 424; *United States* v. *Sullivan*, 274 U.S. 259. And "it was not essential to the admissibility of his testimony that he should first have been warned that what he said might be used against him." *Powers* v. *United States*, 223 U.S. 303, 313. As there was no search or seizure, and as petitioner furnished the information in question without objection, the Fourth Amendment has no application.

2. Petitioner further contends that he was compelled to incriminate himself, in violation of the Fifth Amendment, by the trial court's refusal to permit the witness Dreeben to testify until petitioner had first testified. It is contended that petitioner was thus compelled to take the witness stand

and incriminate himself in order to obtain Dreeben's testimony (Pet. 9).

Dreeben testified as to a conversation which he had with petitioner in 1942 or 1943 in which petitioner was alleged to have discussed his pineapple business and to have indicated that he then considered its profits non-taxable. Dreeben's testimony was first offered and excluded prior to petitioner's taking the stand, and at that time it was probably inadmissible as a self-serving declaration. After petitioner had testified as to that conversation, Dreeben's testimony was received in corroboration. This is entirely in keeping with the rule stated in *Miller* v. *United States*, 120 F. 2d 968 (C.A. 10), and *Haigler* v. *United States*, 172 F. 2d 986 (C.A. 10), on which the petitioner relies so heavily. In any event and more basically, as the Court of Appeals pointed out (R. 1276-1277):

> * * * At the trial no intimation was ever given the court by way of objection or exception that such ruling was in prejudice of defendant's constitutional rights and that it would force him to take the witness stand involuntarily, and we may fairly assume that neither appellant's counsel nor the trial judge understood at the time that it would have such effect. The record further reveals not only that appellant's counsel had already advised the court at the time of such ruling that the defendant would take the witness stand, but also that Dreeben was later permitted to testify as desired. Furthermore, no error in this

regard was even suggested until the taking of this appeal. Under such circumstances, the ruling complained of did not constitute reversible error.

3. No error was involved in the exclusion by the trial court of the letter accompanying petitioner's post-indictment remittance of his alleged tax deficiency. The fact of payment was properly let in as a part of the Government's case as an admission against interest. The payment was evidence only on the issue of the existence of an understatement of taxes. The Government did not seek to introduce the check by which payment was made and petitioner accomplished this during cross-examination of the Government's first witness. Petitioner then offered the letter by which the check had been submitted to the Collector. This letter was properly excluded as it was completely self-serving. It did not explain away the admission as to the existence of the tax deficiency. See VII Wigmore on *Evidence*, Sec. 2113. The letter went to the issue of intent, its substance was stated directly by the petitioner in his testimony and it is significant that no effort was made to put the letter in evidence during the presentation of the taxpayer's defense. It is submitted that no error, much less prejudicial error, arose out of the Court's ruling excluding the taxpayer's letter to the Collector.

4. Petitioner complains of the court's failure to give his requested general instruction on circumstantial evidence. He recognizes, however, (Br.

45) that only the issue of intent rested on circumstantial evidence and it is submitted that the instruction (R. 1066) given by the trial court was fully adequate to inform the jury correctly concerning the standards for testing circumstantial evidence of the petitioner's state of mind. The instruction given is the usual one relating to intent in tax prosecutions. *Paschen* v. *United States,* 70 F. 2d 491 (C.A. 7th).

5. Although petitioner complains that it was improper to elicit from him on cross-examination the fact that his brother-in-law Markusfeld had not reported as income some $95,000 he received from petitioner in 1943 and 1944, this was obviously proper cross-examination. It tended to refute petitioner's contention that the payments were income to Markusfeld (*supra,* p. 8).

CONCLUSION

The decision of the court below is plainly correct and presents no conflict. The petition for writ of certiorari should be denied.

Respectfully submitted,

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JANUARY, 1952.

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